In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-54

PLAQUEMINE EQUIPMENT & MACHINE COMPANY AND THE TRAVELERS INSURANCE COMPANY, PETITIONERS

v.

RAYMOND E. NEUMAN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. In 1964 the Deputy Commissioner of the Bureau of Employees' Compensation, Department of Labor, awarded claimant Robert Flood compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) for a work injury sustained by him on January 14, 1963, while in the employ of petitioner, Plaquemine Equipment

and Machine Company. Seven years later, relying upon a determination in a third party tort suit that the injury producing event had not in fact occurred, the petitioner employer and its compensation carrier, petitioner Travelers Insurance Company, sought to have the unappealed award reconsidered and set aside. The Deputy Commissioner refused to modify the award and the district court, expressly refusing to find that the order of the Deputy Commissioner was not supported by substantial evidence, upheld that decision (Pet. App. 28-29). On appeal, the court of appeals unanimously affirmed in a *per curiam* opinion, holding that there was substantial evidence in the record as a whole to support the Deputy Commissioner's finding that the claimant had been injured on the job (Pet. App. 32-34). A timely petition for writ of certiorari was filed July 10, 1972.

2. An award of benefits under the Act must, of course, be affirmed if there is substantial evidence in the record as a whole to support the Deputy Commissioner's determination.[1] *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504; *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359. Both courts below, applying the proper test, concluded that the award here was supported by substantial evidence. This question does not warrant further review by this Court.

It is therefore respectfully submitted that the petion for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[1] And, of course, the credibility of witnesses in this proceeding is determined by the Deputy Commissioner.

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